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7 **UNITED STATES BANKRUPTCY COURT**
8 **DISTRICT OF ARIZONA**

9 In re:

10 ARCTIC CATERING, INC.

11 Debtor.

Chapter 11 Proceeding

Case No. 2:18-bk-13118-EPB

12 **OBJECTION TO FOOD SERVICE**
13 **OF AMERICA'S APPLICATION**
14 **FOR ALLOWANCE AND**
15 **PAYMENT OF ADMINISTRATIVE**
16 **EXPENSES**

17 Arctic Catering, Inc. (the “**Debtor**”) submits its objection to *Food Service of*
18 *America's Application for Allowance and Payment of Claim for Administrative Expenses*
(the “**Application**”) [DE 57].

19 The Debtor doesn't dispute that Food Service of America (“**FSA**”) is entitled to an
20 allowed administrative expense claim under Section¹ 503(b)(9) for goods delivered within
21 20 days prior to the Petition Date in some amount (the “**503(b)(9) Claim**”). The Debtor,
22 however, disputes FSA's contention that the Court should “direct[ing] the Debtor to pay
23 the amount owed for these purchases.” Application at p. 2. The Application lacks statutory
24 or decisional authority on the timing of payment of the 503(b)(9) Claim, and, more
25 specifically, requiring the Debtor to pay its claim at the time of allowance by this Court.

26 The Debtor's position is supported by the specific sections of the Bankruptcy Code
27 and the case law cited below.

28 ¹ As used herein, “**Section**” refers to a section of chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 *et seq.* (the “**Bankruptcy Code**”).

1 Section 503(b)(9) never mentions timing of payment. 11 U.S.C. § 503(b)(9). It is a
2 rule of priority. Only Section 1129(a)(9) specifically requires a debtor to pay
3 administrative expenses, including Section 503(b)(9) claims, at a set time. *See* 11 U.S.C. §
4 1129(a)(9) (conditioning confirmation of a plan on payment of administrative expense
5 claims on the effective date).² FSA fails to explain why this Court should read a temporal
6 requirement into Section 503(b)(9).

7 The contrast between Section 503(b)(9) and Section 365(d)(3) further illustrates
8 that the Bankruptcy Code imposes no requirement on the timing of a debtor's payment of
9 an allowed Section 503(b)(9) claim. Section 365(d)(3) requires debtors, among other
10 things, to "timely" pay rent under unexpired non-residential real property leases. 11 U.S.C.
11 § 365(d)(3). Nevertheless, despite the Bankruptcy Code's **explicit** requirement to timely
12 pay rent under a lease, Courts have exercised their discretion to permit debtors to pay rent
13 later in the case. *See In re Orient River Invs., Inc.*, 112 B.R. 126, 133 (Bankr. E.D. Pa.
14 1990) (denying landlord's request for immediate payment of rent, irrespective of Section
15 365(d)(3)). If Courts have exercised their discretion to deny landlords' requests for
16 immediate payment of Section 365(d)(3) claims – even when faced with a statutory timing
17 requirement – this Court should deny FSA's request to direct the Debtor to pay the
18 503(b)(9) Claim.

19 Unlike the special protections landlords received in Section 365(d)(3), Congress
20 chose not to similarly enhance the rights of Section 503(b)(9) claimants. Put differently, if
21 Congress had intended to include a temporal requirement on payments to Section
22 503(b)(9) claimants, it would have.

23 In addition to the statutory support, Courts from jurisdictions around the country
24 have held claimants with Section 503(b)(9) claims aren't entitled to immediate payment of
25 their claims. *See, e.g., In re Arts Dairy, LLC*, 414 B.R. 219, 222 (Bankr. N.D. Ohio 2009)

26 ² As the Debtor has represented in other pleadings [*see* DE 87], the Debtor seeks to
27 sell its business and pay its creditors in full, in which case the priority treatment of the
28

1 (sustaining objection of secured creditor on the request of a trade creditor to immediate
2 payment of Section 503(b)(9) claim); *In re Bookbinders' Rests., Inc.*, No. 06-12302ELF,
3 2006 WL 3858020, at *3-5 (Bankr. E.D. Pa. Dec. 28, 2006) (denying request for
4 immediate payment of allowed Section 503(b)(9) claim and overruling argument that
5 claimant had right to be paid at same time as post-petition creditors being paid in the
6 ordinary course under Section 363(c)(1)); *In re Global Home Prods., LLC*, No. 06-10340
7 (KG), 2006 WL 3791955, at *5 (Bankr. D. Del. Dec. 21, 2006) (weighing various factors
8 and denying request for immediate payment). This is an attempt by FSA – one of many in
9 this case – to step over other creditors to get paid, and it should be denied.

10 WHEREFORE, the Debtor respectfully requests that this Court (1) deny FSA's
11 request for immediate payment of the 503(b)(9) Claim, and (2) grant the Debtor such other
12 and further relief as is just and proper.

13 RESPECTFULLY SUBMITTED December 12, 2018.

14 **MAY, POTENZA, BARAN & GILLESPIE,**
15 **P.C.**

16 By s/ Grant L. Cartwright

17 Grant L. Cartwright
18 Andrew A. Harnisch
19 Counsel for Debtor

20 503(b)(9) Claim is likely a non-issue. Nevertheless, should that not happen, the Debtor
21 reserves its rights to object to the amount of the 503(b)(9) Claim at plan confirmation.
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1 COPY of the foregoing mailed or emailed*
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28 By: /s/Elizabeth Luna